No. 2430

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PARROTT & COMPANY
(a corporation),
Libelant and Appellant,

vs.

DOLBADARN CASTLE SHIPPING COMPANY, LIMITED (a corporation) claimant of the British bark "Dolbadarn Castle", her tackle, apparel and furniture,
Claimant and Appellee.

REPLY BRIEF FOR APPELLANT.

LOUIS T. HENGSTLER,
ANDROS & HENGSTLER,
Proctors for Libelant.

Filed this ..... *day of March, 1915.*

FRANK D. MONCKTON, Clerk.

By ..... *Deputy Clerk.*

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1. *The Answer Admits, Without Qualification, that the Cement Was Received by the Ship in Good Order and Condition.*
2. *Claimant's Admission in the Answer that the Steel Plates Were Shipped in Good Order and Condition.*

ALLEGATION IN LIBEL:

"That on or about the 19th day of February, 1910, at the said port of Rotterdam, John P. Best

& Co. shipped, *in good order and condition,* certain merchandise, to wit: 2023 sheets, on the said bark, then and there employed as a general ship in the transportation of cargoes from said port of Rotterdam by said bark to the port of San Francisco, and there to be delivered, in like good order and condition, unto order, or to his or their assignees."

ADMITTED IN ANSWER:

"The 2023 steel plates referred to * * * were received by claimant on board said vessel * * *, but that, when so received, the said plates, or a portion thereof, were *in a more or less rusty condition.*"

Claimant's defense was *not* damage by "rust", and, indeed, libelant does not allege nor claim that the "damaged condition" of the steel plates was due to "rust". The evidence shows that rust does not impair the quality of the plates so as to make them unmerchantable, but that it is "the *eating into the plate, forming pits or grooves*" (Ap. p. 121), which constitutes the damage. "We accepted all the plates that were not *pitted or damaged* in any way after removing the rust, scraping it off" (Ap. p. 122).

"There was evidently some corrosive agency at work there * * *" (p. 123). The chemist testified that this corrosive agency was "*carbon dioxide* in the presence of water" (p. 179). "The *coke* must have been a very potent factor in the cause of pitting" (p. 188).

The allegation of the answer that the plates "were in a more or less rusty condition" is, therefore, consistent with an admission that they were not damaged when shipped. It is safe to say that plates, after being exposed to the air, may always be described as "slightly rusty", or "more or less rusty".

3. *The Answer Admits that, on Delivery at San Francisco, the Barrels of Cement and a Portion of the Steel Plates Were not in the Same Good Order and Condition in Which They Had Been Received.*

4. *"Perils of the Sea" is the Only Defense Made in the Answer.*

Hence the facts which "should be added" to the facts admitted (as contended in the brief for appellee, pages 2-3) have no bearing whatever upon this case.

5. *"Specifications of Error" (pages 4-5 of Brief for Appellee).*

Appellant is credited with boldness in stating that the Court below committed error in throwing the burden of proof on the libelant, under the issues raised by the pleadings.

But there is really nothing heroic in assuming that libelant may find the issues upon which the case is to be tried from claimant's answer.

> "It is as important that the *pleadings* in the admiralty shall show *the issue to be tried* as it is in other courts."
>
> *The Earnwell,* 68 Fed. 229.

In its simplest form the case is the following:

Libelant states: My goods were damaged while they were in your charge as carrier.

Claimant states: True, *but:* They were damaged by perils of the sea.

It follows that claimant is *not* liable if they were damaged by perils of the sea. Claimant *is* liable if they were damaged by any cause except the cause pleaded in defense. The sole issue is, therefore:

"Did perils of the sea cake the cement and pit the steel?"

On this issue claimant had the affirmative. We have shown in our opening brief that claimant's affirmative case was very weak. Libelant, in rebutting it, was naturally handicapped. Its representatives were not present when the goods were exposed to the risk of perils of the sea, and therefore not directly able to show what happened on the voyage. The only witnesses who were present were the representatives of claimant and, if biased at all, are biased in favor of claimant. Under the circumstances libelant showed the story which the damaged goods themselves told when they arrived in port. Their condition revealed to the men of science that the caking of the cement and the pitting

of the steel were caused by the dangerous coke cargo by which they were surrounded.

6. *Appellee's "Reply to Argument of Appellant".*

The "Reply" *assumes* (what is not admitted) that the damages sustained in the transportation of the merchandise *were attributable to causes in the bill of lading;* it *assumes* what it was claimant's duty to plead and prove; in other words, it begs the question. It is quite true, as said in *The Koranna* (Brief for Appellee, page 7), that:

> "Whenever damages which are *attributable to causes excepted* * * * are sustained, * * * the burden of proof is upon the libelant;"

but where the damages are not in fact so attributable (*a fortiori* where they are not even pleaded in defense to be so attributable), the burden lies upon the carrier, and the libelant may rely upon his presumption. Appellee seems to harbor the delusion that the mere fact that it pleads in defense an excepted peril, viz, perils of the sea, shifts the burden of proving negligence upon the libelant, whereas the law is, of course, that the *burden of establishing this defense remains throughout on the claimant.*

Of course, if it were *assumed as a fact from the beginning* that the damage in the case at bar was caused by perils of the sea, the burden would be on libelants to show negligence; but where, as here, it is *denied from the beginning* that the damage was

caused by perils of the sea, claimant must show it affirmatively.

Appellee's citation from *The Good Hope* (page 8 of Brief) is a good illustration of the true principle. The Court said:

> "*Undoubtedly* the cause of the decay and loss was 'heat'—the evidence to that effect is *undoubted*—and heat is an excepted cause."

This is a different case from the one at bar, where the cause of the damage is disputed, and is, indeed, the whole dispute.

Similarly in the case of *The Patria* (cited on page 9 of Brief). The two portions of the opinion italicized in the Brief are correct statements of the law. The first portion applies "when the damage is *manifestly* of the sort excepted" (hence does not apply to the case at bar); the second portion also applies only to the case when "the article arrives broken", and there is no dispute about it.

So also in the case of *The St. Quentin* (cited on pages 9-10 of the Brief). There the injury was "*undoubtedly*" caused by heat. In the case at bar the sole *issue in dispute* is whether the goods were injured by perils of the sea. Claimant had the burden of establishing by a preponderance of the evidence that perils of the sea were the cause of the injury. Instead of holding claimant to this burden, the lower Court imposed upon the libelant the burden of showing improper stowage.

Likewise in *The Königin Louise* (cited on page 11 of the Brief). There "the sole damage was *concededly* due to 'leakage and breakage', a cause which was specifically excepted. *Therefore* the ship is prima facie not liable" (185 Fed. 478, 481). The decision in *The Königin Louise* that "the shipper has the burden of proof to show negligence" is predicated upon this fact. But obviously we have a different case where, as at bar, the damage was *not* concededly due to a cause specifically excepted by the bill of lading. In such a case the burden of *establishing, in affirmative defense,* that the damage was due to such a cause (damage by perils of the sea) is certainly, and throughout the case, upon the ship, and it never shifts upon the shipper or consignee.

In the last paragraph of page 11, and on page 12, of its brief, appellee claims that it has sustained its burden of proving that the ship *was seaworthy and properly stowed.*

Apart from the very meagre proof as to tightness and staunchness of the ship (Captain Baxter's evidence, p. 209, is mere hearsay), we contend that claimant did not sustain its burden of showing that the ship was made reasonably fit to carry a cargo of coke *and* perishable cargoes; that, on the contrary, the evidence shows by clear preponderance that the bulkhead which was supposed and intended to segregate the dangerous cargo from the perish-

able cargo was entirely insufficient, as we have shown in our Opening Brief, and that this unseaworthy condition of the bulkhead caused the damage.

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7. *The Evidence Does not Show That the Damage Was Caused by Perils of the Sea.*

The Court finds:

> "The damage complained of was the caking of cement, and the rusting and pitting of the steel plates. *This damage both to the cement and to the steel plates was occasioned by some form of moisture.*"

The Court then holds that *if* this moisture was sea water, it was caused by perils of the sea and therefore excusable; but *if* it was caused by rust or sweat, the ship was liable only if libelant could show negligence. The conclusion that "part of the damage at least was due to sea water" may apply to 1% or less, and it would follow that 99% or more of the damage was *not* caused by sea water, and that libelant is entitled to judgment for that amount. We have no quarrel with the principles of the cases cited by appellant on page 13 of its Brief.

We have shown in our Opening Brief that claimant has not only failed to show that the caking of the cement and the pitting of the steel plates were due to perils of the sea, but that libelant has shown by a decided preponderance that both were caused by coke sweat and poor ventilation. On this

point one consideration seems to us conclusive: The evidence shows, *without conflict,* that some sea water entered "around the mainmast" (as shown on page 17 of Brief for Appellee, by the testimony of Port Warden Wallace for the ship, and Captain Pillsbury for the libelant); according to the Captain's testimony, some water "went down the ventilators to damage the plates" (Ap. p. 230); the evidence also shows, *without conflict,* that the damage both to the cement and the steel plates, was not localized, but spread all over; these two facts (apart from human testimony) lead inevitably to the conclusion that the agency which caused the damage *pervaded* the cargo space in which the damaged goods were stowed. There is no escape from this "theory".

8. *The Bulkheads.*

On this subject appellee apparently relies upon the statement of the Court below that "the bulkheads were better ones for the purpose intended than those generally in use at the time", although the uncontradicted evidence shows that they were not air tight. The standard suggested by the Court does not satisfy the standard which claimant was bound to maintain by law.

The case of *Ohrloff v. Briscal,* cited on page 20 of the Brief for Appellee, is predicated upon the stowage of two kinds of merchandise in the same hold "in ignorance of the consequences of taking such a cargo". It can have no application to the

case at bar where the captain of the ship testified (Ap. p. 206): "There have been so much damage through not having bulkheads, and I was instructed to have a most perfect bulkhead built on each end of the general cargo." We have shown in our Opening Brief (pages 17-19) that the bulkheads were not adequate to keep the perishable cargo safe from the destructive coke, and the evidence shows clearly that it was in fact the *carbon dioxide released by the coke* which pitted the steel plates. The mere fact that the coke, from one side of the bulkhead, sent the destructive messenger to the steel on the other side is more eloquent than the testimony of witnesses as to the sufficiency of the bulkhead.

The testimony of Captain Baxter is in strange conflict with that of Mr. John A. Bishop—both witnesses interested on the side of appellee. The captain says: "With coke I know that coke is liable to sweat, and that is why I took the precaution to have the bulkheads made in such perfect manner" (p. 225). Mr. Bishop, on the other hand, uses his best efforts to convince the Court that, really, coke is a comparatively harmless cargo (p. 55). If Mr. Bishop is correct, the captain was foolish and extravagant in constructing such perfect bulkheads as he claims them to be; besides, if Mr. Bishop is correct, it is difficult to see why he should take the trouble of initiating the serious steps described by him for the purpose of protecting general cargo from coke (Brief for Appellee, p. 22). The general habits of coke (as testified to by Mr. Bishop who,

as an average adjuster, has presumably a mere hearsay acquaintance with it) become, however, irrelevant in the presence of the admission of Captain Baxter that, in the instance of this ship, the hold where the coke was stowed was in fact stained by sweat *"most decidedly"*. Nothing could be more significant of the nature of this kind of cargo, and the necessity for tight bulkheads than the "aside" of Mr. Meyer, the expert called by claimant, that "I only wish they were water and air-tight sometimes" (Ap. p. 163).

Appellee's authorities to the conclusiveness of "customs and usages of the place of shipment" on the subject of good stowage would have a bearing upon this case if the question were whether matting *or* bulkheads should be used to divide coke and general cargo; but when either one is once used, in accordance with the custom, the only relevant question is whether the matting or bulkhead are adequate for the purpose.

The question of the bulkhead, or the dangerous proximity of the coke, are not, however, the fundamental questions in the case; but the fundamental error which pervades the findings and conclusions of the District Court is to require libelant to maintain the burden of proof under the pleadings and admissions of the parties. This is in conflict with the settled law which again found expression in the recent case of *The Giulia,* 218 Fed. 744, 746, in the following terms:

> "It is admitted that the bales of hemp were received by the carrier in good condition and delivered in bad condition. That being so, there certainly is no question but that the carrier, in seeking to be relieved from liability for damages under the exceptions of perils from the seas, was bound to prove that the injuries were the result of such untoward circumstances as could not have been anticipated and guarded against by the exercise of ordinary care and prudence."

It is respectfully submitted that claimant, in this case, failed to prove that the injuries to the goods were the result of perils of the sea; that the whole case shows by great preponderance of evidence not only that the cause of the injuries was not perils of the sea, but also that the cause of the injuries was unseaworthiness, improper stowage and poor ventilation. The decree of the District Court should be reversed and a decree ordered for libelant for its damages and costs.

Dated, San Francisco,
March 12, 1915.

Respectfully submitted,

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Proctors for Libelant.